Supreme Court, U.S.
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OFFICE OF

No. 01-

IN THE

Supreme Court of the United States

JEFFREY ALAN HARRIS,

Petitioner,

v.

GASTON GALJOUR and PAT GALJOUR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a grandparent visitation case, where the dissenting Judge stated that the facts here are indistinguishable from *Troxel*, the following questions arise:

1) Is the trial court's decision to award grandparents visitation, pursuant to Louisiana's grandparent visitation law, La. R.S. 9:344 A., an unconstitutional infringement of a fit parent's right of custody and control of his child under the Fourteenth Amendment of the Constitution?

2) Is the Louisiana grandparent visitation statute, La. R.S. 9:344 A., a facially unconstitutional violation of the Due Process Clause of the Fourteenth Amendment of the Constitution?

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OPINIONS BELOW

On June 1, 2001, the Louisiana Supreme Court denied, without comment, to grant certiorari to review the opinion by the First Circuit Court of Appeal for the State of Louisiana, dated March 28, 2001, in the case of *Mark Galjour and Mary Juanita Daigle Galjour v. Jeffrey Alan Harris*, No. 2000 CU 2696.[1] (Appendix D and Appendix A). Jeffrey Alan Harris, the father of Camille Megan Harris, appealed the judgment of the trial court (Appendix B), which was affirmed by the Louisiana First Circuit Court of Appeal, awarding visitation to Gaston and Pat Galjour, the maternal grandparents of Camille Megan Harris.

STATEMENT OF JURISDICTION

The Louisiana Supreme Court denied certiorari on June 1, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Since the constitutionality of a state statute may be in question, this Petition has also been served upon the Attorney General of the State of Louisiana pursuant to 28 U.S.C. § 2403(b).

---

1. Gaston Galjour and Pat Galjour, the maternal grandparents of the minor child, intervened in the custody proceeding requesting visitation rights with Camille Megan Harris pursuant to La. R.S. 9:344 A., a portion of the grandparent visitation statute in Louisiana. Ultimately, Mark and Juanita Galjour, the maternal blood uncle of Camille and his wife were dismissed from the action leaving the grandparents as plaintiffs.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the Fourteenth Amendment to the United States Constitution is set forth in Appendix E. The pertinent statute, La. R.S. 9:344 A., is set forth in Appendix E.

STATEMENT OF THE CASE

Jeffrey Harris and Trisha Galjour Harris were married on May 13, 1995 in Las Vegas, Nevada, and thereafter established their matrimonial domicile in the State of Louisiana. Of the marriage, Camille Megan Harris was born on April 2, 1996.

Almost immediately following the birth of Camille, Trisha Harris was diagnosed with an inoperable brain tumor. Jeffrey worked offshore on oil rigs in the Gulf of Mexico and was unable to care for Trisha and his infant daughter, so Trisha and Camille lived with Trisha's family for a short time.

On April 3, 1997, only twenty (20) days prior to her death, Trisha filed for a divorce from Jeffrey. Tragically, Trisha died on April 23, 1997. Immediately thereafter, on April 24, 1997, without any advance notice to Jeffrey, Mark and Juanita Galjour, Trisha's brother and his wife, petitioned the Court for the issuance of an *ex parte* order granting them temporary sole custody of Camille, and petitioned the Court for sole custody of Camille. The Court refused to issue an *ex parte* order of custody, but, in essence, improperly substituted Mark and Juanita Galjour in the divorce proceedings pending between Jeffrey and Trisha, and allowed Mark and Juanita to proceed with their

petition for custody, presumably pursuant to La. C.C. Article 133 which provides for the custody of a child to be awarded to a non-parent.

While surreptitiously seeking *ex parte* sole custody of the minor child, the Galjour's failed to even advise Jeffrey of Trisha Harris' death, such that he was unable to even attend the funeral. From the time of Trisha's death while he was not working offshore, Jeffrey had physical custody of Camille.

Ultimately, in November, 1997, in order to put an end to the litigation with the Galjours involving Camille, a consent judgment was entered into which allowed Mark and Juanita specified visitation with Camille.

In late 1998, Jeffrey retired from his employment offshore allowing him to spend all of his time at home, and to care for Camille full time. During this time, Mark and Juanita Galjour maintained visitation with Camille. Nevertheless, despite Jeffrey's position as the only parent and sole custodian of Camille, Mark and Juanita Galjour continued a pattern of conduct wherein they asserted their belief to Jeffrey that they were the legal representatives of Trisha, and that they were, in some way, ordained to carry out what they believed would have been Trisha's wishes after her death concerning the rearing and raising of Camille.

An example of Mark and Juanita's indifference to Jeffrey's parental authority was that, during their visitation with Camille, Mark and Juanita took her to get her hair cut in the manner that they desired, or in the manner that they felt that Trisha would have had Camille's hair cut. This was done in clear contravention of Jeffrey's specific direction that

his daughter's hair not be cut while with the Galjours. Also, while refusing to disclose to Jeffrey Trisha's burial site, they would, without Jeffrey's knowledge or approval, take Camille to the gravesite. They also consulted with medical and mental care providers concerning the toddler and her well being in relation to her mother's death. This last fact was unknown to Jeffrey until revealed in discovery during this litigation.

Mark and Juanita Galjour's demands on Jeffrey Harris to conform to what they believed to be in Camille's best interests grew over time. These continued demands led Jeffrey Harris to file an action to terminate the visitation exercised by Mark and Juanita Galjour on September 27, 1999.

Mark and Juanita countered with a rule for contempt and, as they did after the Trisha's death over two years earlier, filed a rule for sole custody of Camille or in the alternative for joint custody with them being named domiciliary parents. They did not allege Jeffrey to be unfit but rather that they were, as a matter of fact, better parents than he.

Although they had never had court ordered visitation before, Tricia's parent's, Pat and Gaston Galjour, intervened in the action, asserting their rights to visitation with Camille as her maternal grandparents, pursuant to La. R.S. 9:344 A.

In response to the intervention by the grandparents, Jeffrey challenged the Constitutionality of La. R.S. 9:344 A. in the trial court, and further challenged Mark and Juanita's rights to assert any request for custody and visitation. The trial court maintained the exception of no right of action as it pertained to Mark and Juanita Galjour, and dismissed

them from the proceedings. However, the trial court denied the exception challenging the constitutionality of La. R.S. 9:344 A., and granted grandparent visitation rights. The trial court's decision rested on its opinion "that it is good for a child to have an extended family and to be exposed to an extended family. The more the better." (Appendix B and Appendix C).

The decision of the trial court was appealed. The Louisiana First Circuit Court of Appeal, with one out of three Judges dissenting, affirmed. The dissenting judge observed that "The instant case and *Troxel* are factually indistinguishable." Jeffrey timely filed an application for writ of certiorari with the Louisiana Supreme Court. The Louisiana Supreme Court denied writs.

This case now comes to this Honorable Court for review.

REASONS FOR GRANTING THE WRIT

1. **Is the trial court's decision to award grandparents visitation, pursuant to Louisiana's grandparent visitation law, La. R.S. 9:344 A., an unconstitutional infringement of a fit parent's right of custody and control of his child under the Fourteenth Amendment of the Constitution?**

The law and jurisprudence of Louisiana interpreting La. R.S. 9:344 A. finds a compelling state interest in promotion of extended family contact to deprive an otherwise fit parent of his constitutional right to raise and rear his child. The constitutional right in favor of Jeffrey Harris, as a fit parent, effectively does not exist in Louisiana, or is severely limited by the pervasive nature of the statutory scheme adopted by Louisiana for visitation by grandparents.

Louisiana's third-party visitation statute structure consists of two statutes, La. C.C. Art. 136 and La. R.S. 9:344. The first and broadest covering visitation is La. C.C. Art. 136, which deals with visitation by relatives, and the more specific, La. R.S. 9:344 relates to grandparents and siblings. The instant case between Jeffrey Harris and Gaston and Pat Galjour has been conducted entirely under the authority of La. R.S. 9:344 A., since the Respondents are the grandparents of the minor child. It is submitted that Louisiana's grandparent visitation statute is both facially unconstitutional, and unconstitutional as applied in this case. Accordingly, the order awarding the grandparent visitation is constitutionally defective.

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 2061, 147 L. Ed. 2d 49 (2000).

Louisiana Revised Statute 9:344 provides, in pertinent part:

> **§ 344. Visitation rights of grandparents and siblings**
>
> A. If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority,

> if the court in its discretion find that such visitation rights would be in the best interest of the child or children.

* * *

The jurisprudential case law foundation for the test of constitutionality of Louisiana's grandparent visitation law rests with this case, where the Louisiana First Circuit Court of Appeals held that Louisiana's law on grandparent visitation was constitutional, both as written and as applied in the instant case. *Troxel v. Granville* recently dealt with, in detail, the issue of grandparent visitation.

In *Troxel*, this Court stated that

> so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent's children.

Troxel at p. 2061.

The decision of the trial court, and the Louisiana First Circuit Court of Appeal allowing court ordered grandparent visitation, is in conflict with *Troxel v. Granville*. In fact, Judge Fogg, the dissenting judge in the Louisiana First Circuit Court of Appeal, stated:

> The instant case and *Troxel* are factually indistinguishable. In both, after the demise of one parent, his/her parents sought visitation with their

> grandchild/grandchildren, over the objection of the surviving parent who had not been determined to be unfit. In Troxel, the Supreme Court determined that the State of Washington's legislation giving parents of a deceased father visitation rights violated the Due Process Clause, and therefore, was unconstitutional. Although the Louisiana statute is more narrowly drawn than the Washington statute, its language still affords rights to grandparents that the Supreme Court determined are violative of the surviving parent's constitutional rights of custody, care and management of the child. Therefore, I believe LSA-R.S. 9:344A is unconstitutional as it applies to this case, and would reverse the judgment of the trial court.

As stated by Judge Fogg in his dissent, there is no finding, and in fact no allegation by the grandparents that Jeffrey is an unfit parent. The decision in this case merely rested on the trial court's opinion that having an extended family is good for a child, "the more the better." This is not a sufficient finding on which to award a third party visitation rights with a parent's child.

In dealing with the Washington state court's decision to award grandparent visitation, this Court stated in *Troxel, supra* at p. 2063:

> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham, supra*, at 602, 99 S.Ct. 2493. In that respect, the court's

> presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters.

Just as in *Troxel*, the decision in the instant case failed to provide any protection for Jeffrey's fundamental constitutional right to make decisions concerning the rearing of his daughter. In fact, Jeffrey, just as the mother in the *Troxel* case, had previously allowed the maternal extended family of Camille visitation with the child without court intervention.

It is difficult to distinguish the instant case from that of the *Troxel* case. Neither this case, nor the *Troxel* case involves an unfit parent. Affirming the decision of the Washington State Supreme Court to strike that State's law which permitted visitation without proof of parental unfitness, this Court in *Troxel* stated:

> The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:
>
> > The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most

> situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, [sic] there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell.

Troxel at p. 2062. In Jeffrey's case, the trial court, in reciting its oral ruling granting the grandparent's visitation, states:

> It's the court's opinion that it is good for a child to have an extended family. The more the better. And so because of that I'm going to grant this visitation to the grandparents.

(Verbatim Report of Proceedings at trial court, April 12, 2000, p. 44). While the facts of this case and *Troxel* are hardly distinguishable, the outcome in this case is far different from *Troxel*. The Judgment in this case awards the grandparents monthly visitation, as well as summer and holiday visitation, despite the fact that visitation with Jeffrey's child had never completely denied to the grandparents.

While Jeffrey was opposed to court intervention to order an award of grandparent visitation with his child, he did indicate a willingness to continue allowing the grandparents to see the child voluntarily. The final decision, in the Judge's own words, was merely reduced to the Judge's opinion versus the parent's, with the judge prevailing because she had the power and it was the court's opinion that an extended family is good, "the more the better."

The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made, than that by the parent. *Troxel* at p. 2064.

The trial court's opinion in the instant case, with its presumption that the more extended family a child has the better, created an almost impossible burden on Jeffrey to prove a reason not to grant visitation. The decision of the trial court, as applied in the instant case, merely requires grandparents to prove their status to receive an award of visitation where their child has died. This is an unconstitutional infringement on Jeffrey's fundamental constitutional rights as a parent.

As with the Washington statute, La. R.S. 9:344 A. provides no statutory presumption in favor of the fit parent. Further, it provides no allocation of the burden of proof in an action by a grandparent to such state compelled grandparent visitation.

As in *Troxel*, all the grandparents had to allege and prove was that they were grandparents, and that the parent of the grandchild with whom they sought to have state compelled visitation was their child and is deceased.

The trial court in this case, as in *Troxel*, applied a presumption in favor of the grandparents based solely upon their status as grandparents, that court ordered visitation was *a priori* in the best interest of the child.

Finally, as in the case of the Washington statute in *Troxel*, La. R.S. 9:344 A. gave the court complete and unfettered

discretion to second guess and overturn the decision of the fit parent as to the best interest of the child based solely on the death of the other parent and the survival of one or more of that deceased parent's parents.

A fit parent like Jeffrey should not be compelled into court by the State to, in effect, be "married" to his in-laws. Rather, the in-laws should have to bear the burden of proving the parent's unfitness or coexist with the young parent to convince him of the fact of their best intentions, not compel and force themselves on the lives of the parent and his child through state compulsion.

2. Is the Louisiana grandparent visitation statute, La. R.S. 9:344 A., a facially unconstitutional violation, of Due Process Clause of the Fourteenth Amendment of the Constitution?

While the decision in the instant case is unlawful as applied, Louisiana's grandparent visitation statute, similar to the statute involved in the *Troxel* decision, is exceedingly broad and is unconstitutional on its face. The statute merely provides for an award of visitation "if the court in its discretion finds that such visitation rights would be in the best interest of the child or children." La. R.S. 9:344 A. The Louisiana statute, like the statute challenged in *Troxel*, provides absolutely no provision for any weight to be applied to the parent's opinion in deciding what is in the best interest of his or her child, and there is no requirement of any kind for the court to find that harm would result if the parent's opinion prevailed.

For instance, in *Troxel*, this Court noted that the Washington state visitation statute contains no requirement

that a court accord the parent's decision any presumption of validity or any weight whatsoever, but instead places the best-interest determination solely in the hands of the judge. *Troxel*, supra at p. 2061. Similar to the Washington state third party visitation statute, the Louisiana grandparent statute, La. R.S. 9:344 A. provides that should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. This is exactly what occurred in the instant case.

While La. R.S. 9:344 A. may be more narrowly drawn than the Washington statute in *Troxel*, the narrowing only pertains to limiting the persons who may proceed under law to obtain court ordered visitation against the parent's wishes, that is grandparents. Otherwise, all the failings of the Washington statute as found by the Washington Supreme Court and this Court exist in La. R.S. 9:344 A. There is no requirement to allege unfitness of the surviving parent. There is no requirement of a presumption that the parent's decision, versus the grandparent's decision, is in the best interest of the child. There is no requirement that grandparents bear the burden of proof and finally, there is full, total and unfettered discretion in the trial court to award visitation to grandparents against the wishes of the parent.

The Due Process Clause simply does not allow such interference by the State in a parent's raising of his or her child or children. The Louisiana grandparent visitation statute is unconstitutional on its face, and the decision of the trial court, and the Louisiana First Circuit Court of Appeal upholding the constitutionality of same, should be reversed.

CONCLUSION

Jeffrey Harris is a fit parent who only wants what Pat and Gaston Galjour had, the right of a parent to raise his child without interference by the State in favor of grandparents. The Louisiana grandparent visitation statute is unconstitutional on its face and unconstitutional as applied to his case. Accordingly, this Court should grant the petition for a writ of certiorari, and the Judgment of the trial court affirmed by the First Court of Appeal, awarding Pat and Gaston Galjour court ordered visitation of Camille Megan Harris, should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL FOR THE STATE OF LOUISIANA, FIRST CIRCUIT DATED MARCH 28, 2001

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2000 CU 2696

MARK GALJOUR AND MARY JUANITA
DAIGLE GALJOUR

VERSUS

JEFFREY ALAN HARRIS

Judgment rendered March 28, 2001.

Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 97-11875 B
Honorable Elaine W. Guillot, Judge

* * *

BEFORE: GONZALES, FOGG, AND PETTIGREW, JJ.

Fogg, J. dissents and assigns reasons.

Appendix A

PETTIGREW, J.

This case involves issues related to visitation and custody of a minor child. A dispute arose between the father of the child and the brother and sister-in-law of the child's deceased mother. Subsequently, the maternal grandparents intervened. Following the trial court's judgment as to visitation, all sides have appealed.

FACTS

Jeffrey Alan Harris ("Jeffrey"), defendant herein and a resident of St. Tammany Parish, is the father and natural tutor of the minor child, Camille Megan Harris ("Camille"), born April 2, 1996. Camille's mother, Tricia Galjour Harris ("Tricia"), died on April 23, 1997, from the effects of an inoperable brain tumor.

Immediately following Tricia's death, her brother, Mark Galjour, and his wife, Mary Juanita Daigle Galjour ("Mark and Juanita"), who are residents of Jefferson Parish, instituted the instant action seeking issuance of an emergency *ex parte* order granting them full custody of Camille pending further orders from the court. Additionally, Mark and Juanita sought issuance of a temporary restraining order and prayed for further injunctive relief.

Evidently, in the months prior to her death, Tricia had instituted a divorce and child custody action entitled **Tricia Galjour Harris v. Jeffrey Alan Harris**, #97-11531, 22nd JDC, Division B. Purportedly, on April 4, 1997, Tricia had been granted sole custody of Camille and exclusive use and

occupancy of the family home pending further orders of the court. In connection therewith, Tricia and Jeffrey were scheduled to appear before the court's social worker for a child custody mediation on May 6, 1997, to be followed by a court appearance on May 13, 1997. Due to Tricia's untimely death, Mark and Juanita, as part of their rule, asked that the scheduled hearing dates be maintained, and requested permission to appear in her stead.

The trial court denied Mark and Juanita's request for sole custody and injunctive relief, but maintained the scheduled hearing dates substituting Mark and Juanita in the place of Tricia. The trial court further granted Jeffrey temporary custody of Camille.

Later, on November 3, 1997, the parties entered into a consent judgment. Pursuant to the terms thereof, Jeffrey was granted custody of Camille subject to specific visitation privileges granted to Mark and Juanita. Said visitation consisted of one consecutive week of visitation each month as long as Jeffrey continued to work offshore in excess of seven calendar days per month. In the event Jeffrey modified his work schedule and worked one week or less offshore, then, Mark and Juanita would have visitation with Camille for seven days out of every month although not necessarily consecutive and not necessarily overnight.

Jeffrey stopped working offshore, and retired from all employment outside of the home in December 1998. On September 27, 1999, Jeffrey filed a rule to terminate Mark and Juanita's visitation rights with Camille and alleged therein that Mark and Juanita were attempting to serve as

"surrogate parents" to Camille. In connection therewith, the parties were scheduled to appear before the court's social worker for a mediation of the issues relating to custody and visitation on November 8, 1999, to be followed by a court appearance on November 24, 1999. Mark and Juanita responded by filing a rule for contempt, together with a rule for change of custody and for court-appointed evaluation. These matters were also set to be heard November 24, 1999.

At the November 24, 1999 hearing, the trial court issued an interim judgment that suspended the visitation rights of Mark and Juanita until further orders of the court. The court's judgment recommended however that Jeffrey voluntarily permit Mark and Juanita to "see" Camille. From this judgment, Mark and Juanita filed a motion for a new trial, and a hearing was set for January 6, 2000.

On January 6, 2000, a hearing was held, and a joint agreement was reached between the parties. The agreement, dictated into the record, provided that Jeffrey would participate in a visitation plan to be worked out with Camille's maternal grandparents, Gaston and Pat Galjour ("Mr. and Mrs. Galjour"). Through a motion filed on January 25, 2000, Mr. and Mrs. Galjour intervened and asserted a statutory right to visitation pursuant to La. R.S. 9:344. A status conference originally scheduled for February 23, 2000, was rescheduled for March 13, 2000.

On March 8, 2000, Jeffrey filed several exceptions: namely, a peremptory exception raising the objection of no right of action as to Mark and Juanita, and a peremptory exception questioning the constitutionality of La. R.S. 9:344.

Accordingly, the trial court postponed the March 13, 2000 hearing until April 12, 2000.

On April 12, 2000, a hearing was held on the various rules and motions filed by the parties. In a judgment signed July 21, 2000, the trial court maintained the peremptory exception filed by Jeffrey as to Mark and Juanita. The court's judgment specifically stated that "Mark and . . . Juanita . . . [have] no right of action to pursue the visitation under state law [and] no change of circumstances to modify custody." The trial court further terminated any and all visitation previously exercised by Mark and Juanita and dismissed them as parties to this proceeding.

Additionally, the trial court granted Mr. and Mrs. Galjour's motion to intervene as plaintiffs and denied Jeffrey's exception challenging the constitutionality of La. R.S. 9:344. Pursuant to La. R.S. 9:344A, the trial court granted Mr. and Mrs. Galjour visitation with Camille on every third weekend subject to certain restrictions. The trial court also granted Mr. and Mrs. Galjour an additional one week (seven consecutive days) visitation during each year.

From this judgment, all parties have appealed.

ASSIGNMENTS OF ERROR

On appeal, Mr. and Mrs. Galjour join Mark and Juanita, in assigning the following specifications of error for review by this court:

1. The trial erred in finding that the cross-appellants, the maternal aunt and uncle, Mark

Appendix A

Galjour and Mary Juanita Daigle Galjour, had no right of action to enforce existing visitation rights with the minor child, Camille, or to seek contempt for denial of said visitation or to bring a custody action.

2. The trial court erred in terminating the visitation rights granted by consent judgment unto the maternal aunt and uncle, Mark Galjour and Mary Juanita Daigle Galjour[,] without appointing a mental health professional and without conducting any hearing.

3. The trial court erred in imposing conditions upon Pat Galjour and Gaston Galjour with respect to their grandparent visitation rights without such conditions being recommended by any mental health professional.

Jeffrey has also appealed and assigns the following errors for review by this court:

1. The trial court erred in failing to maintain the exception of lack of constitutionality as to Louisiana Revised Statutes Title 9, Section 344A, both on its face and as applied in the instant case as an impermissible infringement upon the liberty interest of privacy of a parent.

2. The trial court erred in granting the grandparents visitation with the minor child, Camille Harris, without giving any special weight to the

Appendix A

Father's determination of what is in his child's best interest.

3. The trial court erred in not compelling the grandparents to allege and prove the unfitness of the Father as a prerequisite to granting them visitation.

STANDARD OF REVIEW

Every child custody case must be viewed within its own peculiar set of facts. **Connelly v. Connelly**, 94-0527, p. 4 (La. App. 1 Cir. 10/7/94), 644 So.2d 789, 793. The trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. **Thompson v. Thompson**, 532 So.2d 101, 101 (La. 1988) (*per curiam*); **Bercegeay v. Bercegeay**, 96-0516, p. 5 (La. App. 1 Cir. 2/14/97), 689 So.2d 674, 676.

In the instant case, as in most custody cases, the trial court's determination was based heavily on factual findings. As an appellate court, we cannot set aside the trial court's factual findings unless we determine that there is no reasonable factual basis for the findings and the findings are clearly wrong (manifestly erroneous). **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence

differently. Furthermore, when factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus, when there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, although the appellate court may feel its own evaluations and inferences are as reasonable. *Id.*

ANALYSIS

The legal authority relied upon by the parties for the disposition of this matter, includes La. Civ. Code art. 136 and La. R.S. 9:344.

Louisiana Civil Code article 136 provides, in pertinent part:

> B. Under extraordinary circumstances, a relative, by blood or affinity, or a former stepparent or stepgrandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. In determining the best interest of the child, the court shall consider:
>
> (1) The length and quality of the prior relationship between the child and the relative.
>
> (2) Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.

(3) The preference of the child if he is determined to be of sufficient maturity to express a preference.

(4) The willingness of the relative to encourage a close relationship between the child and his parent or parents.

(5) The mental and physical health of the child and the relative.

C. In the event of a conflict between this Article and R.S. 9:344 or 345, the provisions of the statute shall supercede those of this Article.

Additionally, La. R.S. 9:344 provides, in pertinent part:

A. If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

At the outset, we note that Article 136 is located in "Title V – Divorce" of the Civil Code. Specifically, the article is found in Chapter 2 of Title V, which addresses "Provisional and Incidental Proceedings." Therefore, it is clear that Article

136 contemplates a grant of reasonable visitation to relatives upon the parents' divorce, *if* there are extraordinary circumstances *and* upon a finding by the court that such an award is in the best interest of the child. *See* **Vincent v. Vincent**, 98-1346, p. 4 (La. App. 1 Cir. 6/25/99), 739 So.2d 920, 922.

Thus, in an action under Article 136, a relative, by either blood or affinity, bears the dual burden of showing not only extraordinary circumstances that support a grant of visitation rights, but also, that such visitation is in the best interest of the child. The legislature, through La. R.S. 9:344, made it less difficult for a parent of the non-custodial parent to obtain visitation with grandchildren in three situations; i.e., when the noncustodial parent is either dead, interdicted or incarcerated. In these three situations, the grandparent is relieved of the burden of showing extraordinary circumstances, but must nevertheless show that visitation is in the best interest of the child. *See* **Lindsey v. House**, 29,790, p. 3 (La. App. 2 Cir. 9/24/97), 699 So.2d 1190, 1192.[1] Under both Article 136 and La. R.S. 9:344, the right to visitation rests within the trial court's discretion.

The term "extraordinary circumstances" as used in Article 136 has not been defined in the jurisprudence. **Ray v. Ray**, 94-1478, p. 3 (La. App. 3 Cir. 5/3/95), 657 So.2d 171,

---

1. It should be noted that the **Lindsey** decision was rendered prior to the 1999 legislative amendment of La. R.S. 9:344A, which afforded parents of incarcerated persons reasonable visitation rights with their grandchildren where the court finds such visitation to be in the best interest of the child or children involved. *See* 1999 La. Acts No. 352, § 1.

Appendix A

173. In Ray, the natural father died after divorce from the mother, and there was no paternal grandfather who would have had a right to visitation with the child under La. R.S. 9:344. Accordingly, visitation was sought by the child's paternal greatgrandfather and aunt. The third circuit affirmed the trial court's finding of extraordinary circumstances, and opined:

> As a result [of the death of father and the absence of a paternal grandfather], the natural conduits through which the [paternal] great-grandfather and aunt might develop a relationship with [the child] are missing. We believe that it is to remedy such situations that La.Civ.Code art. 136 was enacted. Through this article, the law provides a means of maintaining family relationships where they might otherwise be lost to the child. Therefore, the trial court correctly found extraordinary circumstances in this case.

Ray, 94-1478 at 3, 657 So.2d at 173.

Mark and Juanita rely on the holding in **Ray**, in their quest to be awarded visitation rights. They assert that, as in **Ray**, extraordinary circumstances exist in the instant case. Mark and Juanita argue that not only is Camille's mother deceased, but they, as the maternal uncle and aunt, like the maternal grandparents, have played a significant role in Camille's life from her birth until Jeffrey's termination of visitation three and a half years later. We disagree and are of the opinion that Mark and Juanita's reliance on **Ray** is misplaced.

The peremptory exception pleading the objection of no right of action questions the plaintiff's standing or interest

in the subject matter of the suit. La. Code Civ. P. art. 927A(5); **Guidry v. Dufrene**, 96-0194, p. 3 (La. App. 1 Cir. 11/8/96), 687 So.2d 1044, 1045. The essential function of the objection is to provide a threshold device that questions whether a plaintiff has a right or legal interest in the claim sued on and whether a remedy afforded by law can be invoked by the plaintiff. **Guidry**, 96-0194 at 3, 687 So.2d at 1045-46.

At first blush, Article 136 and La. R.S. 9:344 appear to conflict. Thus, as mandated by the final paragraph of Article 136, the provisions of La. R.S. 9:344 shall supercede those of the article. In the instant case, Tricia had filed for divorce, but she and Jeffrey were not divorced prior to Tricia's untimely death. Accordingly, the trial court rejected Mark and Juanita's claim for visitation and awarded visitation rights to Mr. and Mrs. Galjour pursuant to La. R.S. 9:344. We find no error in this determination.

Having found Article 136 to be inapplicable to these facts, there was no need for the trial court to undertake an analysis of the five factors listed in the article to determine if such visitation was in the best interest of Camille. *See* **Henry v. Henry**, 97-0366, p. 3 (La. App. 1 Cir. 11/7/97), 704 So.2d 793, 796, *writ denied*, 97-3054 (La. 2/13/98), 709 So.2d 752. Since the maternal grandparents were granted visitation pursuant to La. R.S. 9:344A, it is hoped that they will serve, as intimated by the court in **Ray**, as the natural conduits through which the maternal uncle and aunt might sustain their relationship with the child.[2] Accordingly, the

2. In the transcript of the April 12, 2000 hearing, Jeffrey's attorney remarked that Mark and Juanita, and Mr. and Mrs. Galjour "live right behind each other."

first and second errors assigned by Mark, Juanita and Mr. and Mrs. Galjour are without merit.

The third and final error assigned by Mark, Juanita and Mr. and Mrs. Galjour, as well as the three errors assigned by Jeffrey, all relate to the trial court's award of visitation privileges to Mr. and Mrs. Galjour. Specifically, Mark, Juanita and Mr. and Mrs. Galjour take issue with the restriction set forth in the trial court's judgment that states, "When staying with the grandparents, the minor child, Camille, shall sleep in a bed provided for her in a designated bedroom at the grandparents' home." The errors assigned by Jeffrey relate to the constitutionality of La. R.S. 9:344A and whether visitation with the maternal grandparents is in the best interest of the child.

We conclude, particularly in light of our holding below, that the sleeping restriction imposed by the trial court fell well within that court's vast discretion. Accordingly, this assignment of error is without merit.

We now address Jeffrey's assertion that R.S. 9:344A is unconstitutional under both the United States and Louisiana constitutions for the reason that it impermissibly infringes upon a parent's liberty interest in raising children without interference from third parties.

In support of the errors assigned by him, Jeffrey cites and relies on a recent United States Supreme Court case, **Troxel v. Granville**, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). At issue in **Troxel** was a "breathtakingly broad" Washington state statute (Washington Rev. Code

§ 26.10.160(3)) that provided that "[a]ny person" may petition for visitation rights "at any time." The statute further authorized courts in that state to grant such rights whenever visitation would serve the best interest of the minor child, regardless of whether there had been any change of circumstances.

In Troxel, two daughters were born as a result of a common-law relationship. Almost two years after the relationship ended, the father died. Thereafter, the mother sought to limit her daughters' regular visitation with the paternal grandparents to one day per month, with no overnight stay. The paternal grandparents filed suit under the Washington statute requesting two weekends of overnight visitation per month and two weeks of visitation each summer. The superior court ordered visitation as follows: one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. The mother appealed, the appellate court reversed, and the Washington Supreme Court affirmed the reversal holding that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." **In re: Custody of Smith**, 137 Wash.2d 1, 12, 969 P.2d 21, 26-27 (1998).

The United States Supreme Court ultimately granted certiorari and affirmed the judgment of the Washington Supreme Court. In its opinion in **Troxel**, the Supreme Court stated that "[t]he liberty interest in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests

recognized by this Court." **Troxel**, 530 U.S. at __, 120 S.Ct. at 2060. The Court went on to rule that the combination of several factors "compels our conclusion that (the Washington statute] as applied, exceeded the bounds of the Due Process Clause." *Id.* at __, 120 S.Ct. at 2061. In discussing the superior court's visitation order, the Supreme Court stated:

> [T]he Troxels did not allege, and no court has found, that Granville [the mother] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. . . .
>
> Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.
>
> The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. . . .
>
> The [Superior Court] judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. . . .

Appendix A

> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. . . .
>
> Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. . . .
>
> Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. . . . As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better' decision could be made.

Troxel, 530 U.S. at __, 120 S.Ct. at 2061-2064 (citations omitted).

Jeffrey argues the holding of **Troxel** should be applied here. We disagree. First, unlike the Washington statute determined to have been unconstitutional in **Troxel**, La. R.S. 9:344 is more narrowly drawn. The Louisiana legislature has determined that in specified, limited situations, i.e., where one parent dies, is interdicted, or incarcerated, the *parents* of the deceased, interdicted, or incarcerated party *may* have

reasonable visitation rights with the children *provided* the court finds said visitation to be in the best interest of the child. Unlike the Washington statute, the Louisiana legislature expressly limited the scope of La. R.S. 9:344 to the parents of the deceased or absent parent. Additionally, the statute's grant of visitation does not contemplate a significant intrusion upon the child's relationship with the other parent or interference with said parent's fundamental right to make childrearing decisions.

While the trial court denied Jeffrey's exception as to the constitutionality of La. R.S. 9:344, the transcript of the April 12, 2000 hearing reflects that Jeffrey emphatically denied having a problem with Mr. and Mrs. Galjour seeing Camille. Additionally, the transcript reflects that the trial court went to great lengths in acceding to each condition of visitation imposed by Jeffrey. Said conditions, ranging from the time of visitation, the length of visitation, the responsibility for and location of pick up and delivery of the child, as well as restrictions relating to medical treatment and evaluation, travel, sleeping arrangements, and gifts, were all specifically set forth and made a part of the trial court's judgment.

Considering the testimony in the record regarding the length and quality of the relationship previously enjoyed between Camille and Mr. and Mrs. Galjour, and their stated willingness to honor the wishes of her father, we cannot say that the trial court erred in permitting visitation to take place within the parameters set forth by the child's father. It is our further belief that considering Camille's young age, and the apparent absence of a significant female presence in her life,

that Mrs. Galjour could prove to be a reassuring influence especially during Camille's formative years. Accordingly, we find these assignments to be without merit.

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court is hereby affirmed. All costs associated with this appeal shall be borne equally by the plaintiffs, Mark and Juanita Galjour; the intervenors-plaintiffs, Gaston and Pat Galjour; and the defendant, Jeffrey Alan Harris.

AFFIRMED.

Appendix A

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2000 CU 2696

MARK GALJOUR AND MARY JUANITA DAIGLE GALJOUR

VERSUS

JEFFREY ALAN HARRIS

FOGG, J. DISSENTING.

I respectfully dissent due to the recent action by the Supreme Court in the case of **Troxel v. Granville**, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The instant case and **Troxel** are factually indistinguishable. In both, after the demise of one parent, his/her parents sought visitation with their grandchild/grandchildren, over the objection of the surviving parent who had not been determined to be unfit. In **Troxel**, the Supreme Court determined that the State of Washington's legislation giving parents of a deceased father visitation rights violated the Due Process Clause and, therefore, was unconstitutional. Although the Louisiana statute is more narrowly drawn than the Washington statute, its language still affords rights to grandparents that the Supreme Court determined are violative of the surviving parent's constitutional rights of custody, care and management of the child. Therefore, I believe LSA-R.S. 9:344A is unconstitutional as it applies to this case, and would reverse the judgment of the trial court.

APPENDIX B — JUDGMENT OF THE TWENTY-SECOND JUDICIAL DISTRICT FOR THE PARISH OF ST. TAMMANY, STATE OF LOUISIANA DATED AND FILED JULY 20, 2000

22ND JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY STATE OF LOUISIANA

NO. 97-11875

DIVISION "B"

MARK GALJOUR and MARY JUANITA DAIGLE

VERSUS

JEFFREY ALAN HARRIS

FILED: July 20, 2000 s/ Sherri Daix
DEPUTY CLERK

JUDGMENT

A trial was held on April 12, 2000, Harry P. Pastuszek, Jr., attorney for/and Jeffery Alan Harris, Paula Perrone and David Cressy, attorneys for/and Mark Galjour, Mary Juanita Galjour, Pat Galjour, and Gaston Galjour, were present for various rules and motions by the parties herein and upon consideration of the law and evidence;

Appendix B

1.

IT IS ORDERED, ADJUDGED AND DECREED that the Exception of No Right of Action by Jeffery Alan Harris against Mark and Mary Juanita Galjour is hereby MAINTAINED, this Court finding that Mark and Mary Juanita Galjour having no right of action to pursue the visitation under State law and no change of circumstances to modify custody against Jeffery Alan Harris and that the Rule to Terminate by Jeffery Alan Harris against Mark and Mary Juanita Galjour be and is hereby GRANTED, on the same basis that Mark and Mary Juanita Galjour had no right of action to pursue visitation rights previously accorded herein. As such, any and all visitation previously exercised by Mark and Mary Juanita Galjour is hereby terminated under their previous Consent Judgment with Jeffery Alan Harris.

2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mark and Mary Juanita Galjour are hereby DISMISSED as parties to these proceedings.

3.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Intervene as plaintiffs by Gaston and Pat Galjour is GRANTED.

4.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Exception of Lack of Constitutionality by Jeffery Alan Harris is hereby DENIED.

Appendix B

5.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Gaston and Pat Galjour are, pursuant to LSA-R.S. 9:344A, granted visitation with Camille Megan Harris, the minor child of Jeffrey Alan Harris and their granddaughter, according and subject to the following:

A. Every third weekend commencing at 10:00 a.m. on Saturday and terminating at 4:00 p.m. that Sunday.

B. The pick up and drop off shall be at Camille's home to accomplish the visitation, and it shall be by said grandparents.

C. When the third weekend, as provided for herein, is a holiday weekend, then the visitation will occur on the next following weekend which is not a holiday weekend.

D. When staying with the grandparents, the minor child, Camille, shall sleep in a bed provided for her in a designated bedroom at the grandparents' home.

E. The grandparents, in carrying out their visitation, shall notify, in advance, and obtain permission of Jeffery Alan Harris to:

1. Cause Camille to sleep in a bed other than the one in her designated bedroom at their home.

2. Visit the grave site of Camille's mother, Trisha, with Camille.

Appendix B

3. Cause Camille to be seen by a professional of any kind, without limitation to include, but not be limited to a medical care provider, psychiatrist, psychologist, or for the grandparents or anyone on their behalf to contact such professional to render an opinion concerning Camille, except in bonafide medical emergencies. When such a medical emergency exists, then the grandparents or their agents shall, immediately or as soon as possible and with all dispatch, notify the child's father of such emergency and the action taken in response to the emergency. In the event of such emergency, the father, once capable, will thereafter be in charge of all decision making concerning the action to be taken in response to the emergency.

4. Refrain from purchasing items that would normally be purchased by a parent, such as, but not without limitation, shoes, dresses, underwear, and the like. This limitation does not extend to the purchase of gifts for major Holidays or other occasions where a gift is appropriate for the occasion such as Christmas, birthdays, etc.

5. To take the child out of the metropolitan area of New Orleans, Louisiana.

Appendix B

6.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the grandparents will have an additional one (1) week or seven (7) consecutive days beginning and ending as agreed upon by the parties in writing. The grandparents shall make known the week they desire as early as possible. In the event that the parties cannot agree on a particular week, then the father shall designate the week and make the child available for that week.

7.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the grandparents will be permitted to see the child sometime Christmas Eve or Christmas Day for a period of time to be arranged and determined by the Father.

8.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither the grandparents nor their agents shall not in any way interfere with the raising of the child by her father. This is to include, but not limited to, attempting to force discussions as to what they believe to be in the child's best interest, or discussions concerning action or inaction by the father as to the child's activities.

Covington, Louisiana this 21st day of July, 2000.

s/ Elaine W. Guillot
JUDGE

APPENDIX C — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF THE TWENTY-SECOND JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY, STATE OF LOUISIANA DATED APRIL 12, 2000

TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

NUMBER 97-11875

DIVISION "B"

MARK GALJOUR

VERSUS

JEFFREY ALAN HARRIS

PROCEEDINGS taken in open Court on April 12, 2000, before the Honorable Elaine W. Guillot, Judge presiding, Covington, Louisiana.

* * *

[44] It's the Court's opinion that it is good for a child to have an extended family and to be exposed to an extended family. The more the better. And so because of that I'm going to grant this visitation to the grandparents. I'm going to put some restrictions on it, however. I'm going to give them visitation every other weekend at 10:00 a.m. on Saturday to 4:00 p.m. on Sunday, the third weekend of the month. The child is to spend the night at the grandparent's home.

Appendix C

BY MR. CRESSY:

You said every other weekend?

BY THE COURT:

I'm sorry, one weekend a month on the third weekend the child is to spend the night at the grandparent's home in Metairie unless the grandparents notify and get permission from the father to bring the child somewhere else.

The child is not to be taken to the mother's gravesite without the permission of the father.

The child is not to be taken for any medical, psychological or any other professional treatment without the father's permission unless it is an emergency. And if it is an emergency, then the grandparents are to notify the father as soon as possible.

The grandparents are not to interfere in any way in raising the child and they are to ask the father before they buy any clothes or [45] anything like that for the child. I'm not talking about presents, Christmas gifts or anything but clothing, those items that a parent would normally buy for the child.

Also, I'm going to give them one week during the summer and some time at Christmas, which I hope the father can arrange either sometime Christmas Eve or Christmas day so the child can see the grandparents.

Appendix C

I'm not going to really put any restrictions on who can visit the child when they're at the grandparent's house. And I'm hoping that ya'll can start working together now that this is over hopefully and maybe as time goes on, things will heal and maybe visitation can be expanded sometime in the future.

And, Mr. Harris, I think that there will be problems Mr. and Mrs. Galjour, the grandparents, can probably help you along and you're going to need some help raising a little girl. So they would be a very good resource to you. You all can try to get past this litigation and get on with your lives.

BY MS. PERRONE:

Whatever the third weekend is, so starting immediately?

BY THE COURT:

Yes, the third.

BY MS. PERRONE:

So this is the second weekend, probably this coming weekend?

[46] BY THE COURT:

That's what the limitation is unless it's a holiday. If the third weekend contains a holiday, then the visitation will be changed to the fourth weekend of the month.

(END OF PROCEEDINGS)

* * * *

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DENYING APPLICATION FOR WRIT OF CERTIORARI AND/OR REVIEW DATED JUNE 1, 2001

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2001-C-1273

MARK GALJOUR AND MARY JUANITA DAIGLE GALJOUR

VS.

JEFFREY ALAN HARRIS

IN RE: Harris Jeffrey Alan; – Defendant; Applying for Writ of Certiorari and/or Review, Parish of St. Tammany, 22nd Judicial District Court Div. B, Nos. 97-11875; to the Court of Appeal, First Circuit, No. 2000 CU 2696

June 1, 2001

Denied.

JPV
PFC
CDK
CDT
JTK
PCC
RLL

Appendix D

Supreme Court of Louisiana
June 1, 2001

s/ Rai T. Daigle
Deputy Clerk of Court
For the Court

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. XIV, § 1

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

La. R.S. § 344A.

§ 344. Visitation rights of grandparents and siblings

A. If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

* * * *

SUPREME COURT, U.S.
FILED
OCT 9 2001
OFFICE OF THE CLERK

No. 01-411

IN THE

Supreme Court of the United States

JEFFREY ALAN HARRIS,

Petitioner,

v.

GASTON GALJOUR and PAT GALJOUR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL

BRIEF IN OPPOSITION FOR RESPONDENTS GASTON GALJOUR AND PAT GALJOUR

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RESPONDENTS' STATEMENT OF THE CASE

Respondents, Gaston and Pat Galjour, the maternal grandparents of the minor child Camille Harris, respectfully submit their statement of the case pursuant to *Rule 15* of the *Rules of the Supreme Court of the United States*. Respondents take issue with petitioner's *Statement of the Case* as much of what is stated is argument and/or opinion and is not necessarily a factual summary of the proceedings below. Accordingly, respondents submit this statement, together with record references.

Additionally, there is a somewhat confusing chronology of events due to the fact that the initial proceedings were brought by Juanita and Mark Galjour, the maternal aunt and uncle of the minor child Camille Harris, pursuant to other statutory authority not before this Court. Respondents, the maternal grandparents, were allowed to intervene in the proceedings and to assert their own claim for visitation rights, pursuant to the statute at issue, La. R.S. 9:344A, commonly known as the grandparent visitation statute.

Up to the point in time that the grandparents intervened, they had been exercising visitation of Camille contemporaneously with the maternal aunt and uncle, as the aunt and uncle were parties to a Consent Judgment (discussed below) of visitation involving the minor child, Camille Harris. The maternal aunt and uncle lived in a house which adjoined that of respondents.

The grandmother, respondent Pat Galjour, testified at the April 12, 2000 trial, referenced below, about the nature of the relationship with her granddaughter, Camille, and stated that ever since Camille was born, she and her husband had

been involved with Camille, helping Jeffrey Harris (the petitioner) raise and take care of Camille because the child's mother was ill. (Record, p. 163, lines 23-26).

The grandmother also stated that she spent "pretty much" every other week with Camille when Jeffrey was offshore, and even during some of the time when he was there because the mother was receiving treatment at the hospital. (Record, p. 163, lines 28-320).

Petitioner Jeffrey Allen Harris is the natural father of the minor child, Camille Megan Harris, who was born on April 2, 1996. Trisha Harris was the natural mother of Camille who died on April 22, 1997 of an inoperable brain tumor. (Record, p. 164, lines 1-5). Prior to her death, Trisha Harris had instituted a divorce and child custody action as referenced in the *Petition for Emergency Ex Parte Custody Order and for Injunctive Relief*, found at p. 1 of the Record.

Mark Galjour and Juanita Galjour are the maternal uncle and aunt of the minor, Camille. As found at p. 2 of the Record, on April 24, 1997, after Trisha died on April 23, 1997, Mark and Juanita filed a *Petition for Emergency Ex Parte Custody Order and for Injunctive Relief.*

In the aforementioned petition, the maternal aunt and uncle alleged that Jeffrey Harris was employed by Shell Offshore, Inc., worked offshore seven days on/seven days off, and was accordingly unable to properly care for Camille Harris (Record, p. 3), that he had made no inquiries concerning Camille Harris for the entire time that Camille Harris had been staying with the maternal aunt and uncle and had not provided for or supported Camille Harris from the time of the filing of Trisha Harris' divorce petition (Record, p. 4).

Further, Juanita and Mark Galjour alleged, as was alleged in Trisha Harris' divorce petition, that Jeffrey Harris appeared to have an alcohol abuse problem which had "caused him to interact angrily and inappropriately to Camille Harris" (Record, p. 4). The ex parte request for sole custody brought by the aunt and uncle was denied. The Court further ordered a meeting with the social worker on May 13, 1997 (Record, p. 8).

Thereafter, a *Consent Judgment* was executed by Jeffrey Harris and the aunt and uncle on November 3, 1997, whereby Juanita and Mark Galjour were given substantial visitation rights (Record, p. 11). From May of 1997, when they had all met at court for a meeting with the social worker, up to the execution of the *Consent Judgment* in November of 1997, the aunt and uncle and the father had been following basically the same visitation schedule as was stated in the *Consent Judgment*, as admitted by Jeffrey Harris in the hearing on April 12, 2000 (Record, p. 134, lines 29-32).

The *Consent Judgment* provided visitation to Mark and Juanita Galjour for one consecutive week period of time every month, as long as Jeffrey Harris continued to work offshore in excess of seven calendar days per month. Further, the *Consent Judgment* contained a provision that should Jeffrey Harris modify his work schedule to provide for one week or less of offshore work, Mark Galjour and Juanita Galjour "shall be allowed visitation with the minor child for seven days out of every month, not necessarily consecutive and not necessarily overnight" with the specific days to be at the discretion of Jeffrey Harris to be coordinated with the schedule of Mark and Juanita.

On September 27, 1999, Jeffrey Harris filed a rule to terminate visitation and did not allow Mark and Juanita Galjour to see Camille. On November 3, 1999, they filed a *Rule for Contempt* for Jeffrey Harris' denial of their visitation rights as provided in the November 3, 1997 *Consent Judgment* and rule for change of custody and for court-appointed evaluation (Record, pp. 19-30).

On November 24, 1999, without taking any testimony nor any evidence of any kind, the trial court summarily suspended their visitation rights under the November 3, 1997 judgment (Record, p. 46). The trial court did recommend, however, that Jeffrey Harris *voluntarily* permit the maternal aunt and uncle to see Camille pending further orders of the Court.

Thereafter, Mark and Juanita Galjour filed a *Motion for a New Trial* which was set down for hearing on January 6, 2000 (Record, p. 49). The matters set down for the Court on January 6, 2000, in addition to the *Motion for New Trial*, were Jeffrey Harris' *Rule to Terminate Visitation*, the Galjours' *Rule for Court-Appointed Evaluation*, and the *Rule for Contempt* filed by the Galjours.

The maternal aunt and uncle attempted a resolution of the matters with Jeffrey Harris and they all acknowledged and consented to allow an intervention to be filed by respondents, the maternal grandparents, as read into the court record on that same day. A transcript of that proceeding is found in the Record at pp. 81 through 88. Respondents thereafter filed a *Motion to Intervene* on January 25, 2000 (Record, pp. 74 and 75).

On March 8, 2000, Jeffrey Harris filed *Peremptory Exceptions of No Right of Action* as to Mark and Juanita Galjour and a *Peremptory Exception of Lack of Constitutionality as to La. R.S. 9:344*, as to the respondents Gaston and Pat Galjour, the grandparents.

A trial was held on April 12, 2000, wherein the *Exception of No Right of Action* as against Mark and Juanita Galjour was maintained while the *Peremptory Exception of Lack of Constitutionality as to La. R.S. 9:344* was denied by the trial judge (Record, p. 131). The Louisiana First Circuit Court of Appeal affirmed that decision. Thereafter, the Louisiana Supreme Court unanimously denied writs.

REASONS FOR DENYING THE WRIT

The inextricably intertwined questions presented by the petition are: (1) whether grandparent visitation, pursuant to Louisiana's grandparent visitation statute, is an unconstitutional infringement of a fit parent's right of custody and control under the Fourteenth Amendment of the Constitution and (2) whether Louisiana's grandparent visitation statute creates a facially unconstitutional violation of the Due Process Clause of the Fourteenth Amendment of the Constitution.

As stated above, the Louisiana Supreme Court unanimously denied petitioner's writs from a ruling by the First Circuit Court of Appeal which held that the Louisiana grandparent visitation statute was constitutional in light of this Court's ruling in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (U.S. Wash. 2000).

First, the Court of Appeal found that Louisiana's statute was much more narrowly drawn than the Washington state statute in *Troxel*. In further distinguishing the case before it with the *Troxel* case, the Court of Appeal also ruled that the transcript of the hearing reflected that the Petitioner herein, Jeffrey Harris, emphatically denied having a problem with the grandparents seeing Camille and that additionally, the transcript revealed that "the trial court went to great lengths in acceding to each condition of visitation imposed by Jeffrey." (Petitioner's *Writ of Certiorari*, Appendix A, page 17a). Accordingly, this Court should deny Petitioner's Writ of Certiorari.

I.

THE STATE APPELLATE COURT DECISION DOES NOT CONFLICT WITH THIS COURT'S RULING IN *TROXEL v. GRANVILLE*

The First Circuit Court of Appeal fully considered this Court's decision in *Troxel*. The petitioner Jeffrey Harris relies solely upon this Court's ruling in *Troxel* as the basis for his challenge to the constitutionality of Louisiana Revised Statutes 9:344A. Yet a careful review of the *Troxel* decision reveals marked distinctions to the case at bar.

First, this Court struck down the Washington state statute on the basis of over-breadth alone. The statute in question stated that: "[A]ny person may petition the court for visitation rights at any time" and the Court may grant such visitation rights whenever "visitation may serve the best interest of the child." § 26.10.160(3). This Court in *Troxel*, at p. 2064 held:

Neither the Washington non-parental visitation statute generally – which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted – nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional. Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court – whether the due process clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not and need not define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best elaborated with care.

And post at 2079 (dissenting opinion): Because much state court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold specific non-parental visitation statutes violate the due process clause as a per se matter.

In marked contrast to the Washington state statute, the Louisiana statute in question, La. R.S. 9:344A, provides:

> If one of the parties to a marriage dies, is interdicted or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted or incarcerated party without such custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.

This Court's sole basis for striking down the Washington State statute in *Troxel* was that it allowed *any* person to petition for forced visitation of a child at *any* time with the only requirement being that the visitation serve the best interest of the child. 120 S. Ct. at 2059. This is not so in Louisiana.

First, the Louisiana statute imposes the requirement that one of the parties to a marriage must be deceased, interdicted or incarcerated before any visitation of a minor child or children of such marriage can be sought. Second, a person seeking visitation must be a parent of the deceased, interdicted or incarcerated party without such custody. Third, the court has the discretion to decide, even if the other two conditions are met, whether such visitation is in the best interests of the child (children) involved.

Even assuming for the moment that this Court were to look beyond the over-breadth argument of *Troxel*, it would find that both the trial court and the First Circuit Court of

Appeal properly applied the three-part test of the statute and balanced all of the parties' competing interests, including those of the child. Therefore, petitioner's writ should be denied.

Both the Galjour grandparents and the Galjour maternal uncle and aunt had a long-standing familial bond since birth with the minor child Camille, a bond exercised on virtually a daily basis due to the mother's immediately developing a terminal condition at the child's birth, coupled with the fact that the child's father worked offshore. These two factors created a situation whereby the child Camille, from infancy, naturally bonded with her maternal grandparents and her maternal uncle and aunt. Those bonds should not be torn as under the guise of constitutionality: the statute is not overly broad and should remain intact.

Further, the trial court took Jeffrey Harris' desires not only into consideration but used them to fashion her order, which is what this Court in *Troxel* indicated was necessary.

Justice O'Connor in the majority opinion stated:

> In an ideal world parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an inter-generational relationship would be beneficial in any specific cases for a parent to make in the first instance and, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination. 120 S. Ct. at 2062.

Likewise, in Justice Stevens' dissent, he traced the history of many of the cases which have come before this Court regarding parent/children relationships. That history should provide ample guidance for this Court to uphold the constitutionality of the Louisiana statute.

Justice Stevens stated:

> The court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the court would have been even wiser to deny certiorari. Given the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme Court decision that merely requires the state legislature to draft a better statute. 120 S.Ct. at 2068.

Justice Stevens further opined that:

> The second key aspect of the Washington Supreme Court's holding – that the Federal Constitution requires a showing of actual or potential 'harm' to the child before a court may order visitation continued over a parent's objection – finds no support in this Court's case law. While the court recognizes the Federal Constitution certainly protects the parent/child relationship from arbitrary impairment by the State, see infra at 2071-2072, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield protecting every arbitrary parental decision from

> any challenge absent a threshold finding of harm. The presumption that parental decisions generally serve the best interest of their children is found and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession. *Id.* at 2070-2071.

Justice Stevens went on to state that there is, at minimum, a third individual whose interests are implicated in every case to which the statute applied – the child.

> It has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the fundamental liberty interests implicated by the challenged state action. My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interest included most often in the constellation of liberties protected through the 14th Amendment. *Ante.* at 2059-2061.
>
> Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children and of course finding privacy interest – except absent exceptional circumstances – in doing so without the undue interference of strangers to them and their child. *Id.* at 2071.

However, that was not the end of the discussion, for Justice Stevens concluded his dissent by stating that:

A parent's rights with respect to her child have thus never been regarded as absolute but rather are limited by the existence of an actual, developed relationship with the child and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this court's assumption that a parent's interest in a child must be balanced against the state's long-recognized interest as *parens patriae*. See, *E.G. Reno v. Flores*, 507 U.S. 292, 303-304, 113 S.Ct. 1439, 123 L.Ed. 2d 1 (1993); *Santosky v. Kramer*, 455 U.S. at 766, 102 S.Ct. 1388; *Parham*, 442 U.S. at 605, 99 S.Ct. 2493; *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky*, 455 U.S. at 760, 102 S.Ct. 1388. While this Court has not yet had occasion to elucidate the nature of the child's liberty interest in preserving established familial or family-like bonds, 491 U.S. at 130, 109 S.Ct. 2333 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interest be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this court reject any suggestion that when it comes to parental rights, children are so much chattel. See *Ante*. at 2059-2060 (opinion of

> O'Connor, J., describing states' recognition of "an independent third-party interest in a child.") The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the states from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child. *Id.* at 2072.

In the instant case, Mr. Harris argues that LSA-R.S. 9:344A violates his constitutional rights as a parent. Mr. Harris has erroneously placed his concerns, his liberty interests, above those of the minor child, Camille.

Mr. Harris seems to argue that the State of Louisiana, by enacting La. R.S. 9:344, somehow burdened his fundamental right to make decisions with regard to child-rearing and family relationships. This is simply not the case. The statute is a narrowly-drawn statute granting only to the grandparents reasonable visitation rights to the child during the child's minority, if the court, in its discretion, finds that such visitation rights would be in the best interest of the child. The statute only applies if the non-custodial parent is deceased, interdicted or incarcerated.

This statute cannot be read or stretched in any way to be interpreted as granting unto grandparents the same rights and status as parents. Mr. Harris further argues that creating these rights usurps the inherent authority of a parent to raise his or her child in the manner which they see fit. Visitation does nothing of the sort. It only provides a bond and contact with the family of the deceased parent, just as if the deceased non-custodial parent were still alive and exercising his or her own visitation rights in the event of a divorce.

The compelling state interest is in maintaining the unity and sanctity of the child's *entire* family. This is especially true in Louisiana where ascendants as well as descendants owe one another the reciprocal duty of support, under certain circumstances.

The "historical, traditional and fundamental right to raise children free from state interference" is not in jeopardy here. The U.S. Supreme Court has always recognized that while parents should be generally free to exercise their parental rights in raising their children, that right is not an unfettered and unbridled right. The well-being of its children is a subject within the state's power to regulate. *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 1280, 20 L. Ed. 2d 195 (1968). Nor does Jeffrey Harris' fitness as a custodial parent have anything to do with the granting of grandparents' rights.

What Mr. Harris does not address are the liberty interests and the rights of association which his minor daughter, Camille, has *of right* and *should* be able to exercise with her deceased mother's side of the family. That part of her birthright is just as important to her as that of her father's side of the family. Just because she cannot articulate how important those bonds are to her at this point in her life makes them no less precious. Where else will she learn of her mother and her family, if not from the respondents and the extended Galjour family?

Indeed, Justice Stevens, in *Troxel*, pointed to the U.S. Supreme Court's decisions where minors were protected by the constitution and recognized as possessing constitutional rights. *Tinker v. Demoines Independent Community School District*, 393 U.S. 503, 506-507, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), First Amendment right to political speech;

In re Gault, 387 U.S. 1, 13, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1957), due process rights in criminal proceeding. 120 S. Ct. at 2072.

Justice Stevens indicated further that:

> We should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this court of a constitutional rule that treats a biological parent – liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the states, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interest that give rise to disputes such as this. Far from guaranteeing that parents' interests will be trammeled in the sweep of cases arising under the statute, the Washington law merely gives the individual – with whom a child may have an established relationship – the procedural right to ask a state to ask his arbitrator, through the entirely well-known best interest standards between the parents' protected interests and the child's. It seems clear to me that the due process clause of the 14th Amendment leaves room for states to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interest of the child. 120 S.Ct. at 2073, 2074.

This is precisely the type of case this Court has before it today. The maternal grandparents have established a bond with Camille as described in detail throughout these proceedings. The existence of such a bond has never been disputed.

As Justice Kennedy in his dissent foreshadowed:

> Cases are sure to arise – perhaps a substantial number of cases – in which a third party, by acting in a care giving role over a significant period of time, has developed a relationship with the child which is not necessarily subject to absolute parental veto. See *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333-105 L.Ed. 2d 91 (1989) (putative natural father not entitled to rebut state law presumption that child born in a marriage is a child of the marriage); *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed. 2d 511 (1978) (best interest standard sufficient in adoption proceedings to protect interest of natural father who had not legitimated the child); see also, *Lahr v. Robertson,* 463 U.S. 248, 261, 103 S.Ct. 2985, 77 L.Ed. 2d 614 (1983) (the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children . . . as well as from the fact of blood relationship) (quoting *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 844, 97 S.Ct. 2094, 53 L.Ed. 2d 14 (1977); in turn, quoting *Yoder,* 406 U.S. at 231-233, 92 S.Ct. 1526). Some

> preexisting relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to insure the child's welfare. As the State Supreme Court was correct in acknowledging, those relationships can be so enduring that "in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child," *In re Smith,* 137 Wash. 2d at 20969 P.2d at 30; and harm to the adult may also ensue.

The Louisiana statute in question does not offend the notion of substantive due process because it is narrowly tailored to further the state's interest. The state's interest is one of further affirming strong families, continuing family contact upon the death of a parent and leaving that visitation to the discretion of the court for the court to determine what is in the best interest of the child. A similar constitutional challenge was unsuccessfully mounted against La. Civil Code Article 136(B), an article closely akin to La. R.S. 9:344A, the statute being challenged herein. Louisiana Civil Code Article 136 provides:

> (B) Under extraordinary circumstances, a relative, by blood or affinity, or a former step-parent or step-grandparent, not granted custody of the child, may be granted reasonable visitation rights if the Court finds that it is in the best interest of the child. In determining the best interest of the child, the Court shall consider: (1) The length and quality of the prior relationship between the child and the

> relative. (2) Whether the child is in need of guidance, enlightenment or tutelage which can best be provided by the relative. (3) The preference of the child if he is determined to be of sufficient maturity to express a preference. (4) The willingness of the relative to encourage a close relationship between the child and his parent or parents. (5) The mental and physical health of the child and the relative.

The Louisiana First Circuit Court of Appeal in *Reinhardt v. Reinhardt*, 97-1889 (La. App. 1 Cir. 9/25/98); 720 So.2d 78, *writ denied*, 98-2697 (La. 12/18/98), 734 So.2d 635, *certiorari denied*, 526 U.S.1114, 119 S. Ct. 1761, 143 L. Ed. 2d 792 (1999), when examining the constitutionality of Louisiana Civil Code Article 136(B), held that statutes are presumed to be valid. If possible, the constitutionality of a statute should be upheld and the burden of proof rests with the party attacking the statute. *Soloco, Inc. v. Dupree*, 97-1256 p. 3 (La. 1/12/98), 707 So.2d 12, 14.

The strict scrutiny test was applied to Article 136(B) which visitation was argued to be an impingement upon the *Reinhardt* defendant/appellant's parental rights. The *Reinhardt* Court in upholding Article 136(B), held that there was a compelling state interest in stabilizing broken or single parent families through visitation with extended family members.

The Court in *Reinhardt* recognized that the state has a substantial interest in encouraging beneficial extended family relationships with children and, in the absence of grandparent or family member visitation, a child's relationship with one side of their extended family may be lost. Without doubt,

the compelling state interest is the same under La. R.S. 9:344A as was found to exist under Louisiana Civil Code Article 136(B). For the same reasons, the Louisiana court's ruling regarding the constitutionality of La. R.S. 9:344A should not be disturbed.

The risk of harm discussed by Justice Kennedy and the child's liberty interest addressed by Justice Stevens in their thoughtful dissents do not conflict with the very narrow and limited ruling of the majority opinion in *Troxel* insofar as any interpretation of La. R.S. 9:344A would be concerned. Those two Justices' dissents, along with the majority opinion, delineate circumstances under which states would not be impermissibly interfering with parental rights. The Louisiana statute at issue falls within those lawful parameters.

Although the U.S. Supreme Court has not yet ventured down the child's rights path,[1] the state trial court below implicitly recognized the fundamental nature of a child's liberty interest in preserving established family or family-like bonds. Camille's liberty interest in preserving the bonds with her mother's family, especially given the fact that her mother is deceased, must not be ignored.

Legislatures all across the country over the course of last two decades have enacted laws which variously call for custody evaluations by mental health professionals, mandated mediation, and other court-ordered mechanisms when a minor child's living circumstances change due to a divorce. There is no less reason to believe that a child would experience a like or greater upheaval when a parent dies and

1. It has been reserved as a question in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989).

the child is at risk of losing familial contact with the deceased parent's family. For the reasons cited above, the statute is constitutional on its face.

II.

THE STATUTE IS NOT UNCONSTITUTIONAL "AS APPLIED": THE RECORD BELOW REVEALS THAT PETITIONER DENIED HAVING A PROBLEM WITH THE GRANDPARENTS' VISITATION AND THAT EVERY CONDITION REGARDING VISITATION IMPOSED BY PETITIONER WAS GRANTED

Though not reached because of this Court's ruling that the Washington state statute was overly broad, some of the Justices seemed troubled by the fact that the trial court in *Troxel* granted the grandparents visitation when the parent did not want same. This is not an issue for this Court's consideration.

As recognized by the Court of Appeal in its decision, the conditions which Jeffrey Harris sought to impose upon the grandparents in the exercise of their visitation with Camille were all honored by the trial court. (Petitioner's *Writ of Certiorari*, Appendix A, page 17a). Those specific conditions, as demonstrated amply throughout the record, are referenced below. Thus, it cannot be said that the statute was unconstitutional, "as applied."

Although Jeffrey Harris testified that he had insisted on supervising the grandparents Pat and Gaston Galjour with their visitation *prior* to going to trial, he claimed his reason for doing so was because

> we were in litigation again or still. There have been child psychologists and all the child head doctors, counselors were involved and they were going to testify to this and that I didn't want them snatching the child and bringing her to a head shrink without my knowledge or permission or consent.

(Record, p. 160, lines 15-25.)

When Jeffery Harris was specifically asked,

> assuming that stipulation or that restriction is going to be placed by the Court on Pat and Gaston Galjour, then you don't have any fears, do you, about the way they treat your child? As far as restrictions, as far as the other restrictions we discussed or you have already testified about, there was no reason for you to restrict visitation and supervise visitation other than your concern about litigation; is that correct?

(Record, p. 160, lines 26-32; p. 161, lines 1-2.)

Mr. Pastuszek interjected, "I think we're off the stipulation. There's never been any reason to believe by Mr. Harris there was any physical harm brought to the child by either the maternal grandparents or Mark and Juanita. If that's what's being sought, I believe we'll stipulate to that." (Record, p. 161, lines 3-9.)

When asked about grandparents' weekend visitation, "How would you like that weekend defined? When would it begin and when would it end?" Jeffrey Harris replied,

"Pick her up Saturday morning and drop her off Sunday afternoon so she can have her afternoon meal, get ready for bed and ready for school the following day." (Record, p. 142, lines 23-32).

"What time Saturday morning?" "10:00 a.m." "What time would she be delivered Sunday afternoon?" "4:00 p.m." (Record, p. 143, lines 1-2.)

Mr. Harris also specified that he would like the visitation to take place on the third weekend of the month with the restrictions that Camille see no professionals except an emergency room physician, and that they call him on the way to the hospital (Record, p. 143, lines 3-17). When asked again as to what restrictions he would have with respect to the notification of the child being removed from the metropolitan area, he said, "I don't see any reason for her to leave the metropolitan area and I would like prior notice" (Record, p. 143, lines 31-32; p. 144, lines 1-11).

Mr. Harris also requested that he wanted the grandparents to ask him before they were to buy a major gift (Record, p. 145, lines 2-14). He also asked the Court to restrict the grandparents (or any family members) from taking the child to her mother's grave site, and that he (the father) make all major decisions as far as school, dance, religion, haircuts, fingernail polish (Record, p. 146, lines 4-13). "The only person to make Camille's major life's decisions shall be me." (Record, p. 147, lines 7-8.)

Mr. Harris continued with very precise conditions:

> I would like Camille in one bed. Part of the problem is she has five beds, four sets of disciplinarians, four sets of rules. When she visits,

> she should have a bed, should know where her bedroom is, not the couch at Mark and Juanita's, not on a boat, not in hammocks, this is my bed.

(Record, p. 161, lines 11-17.)

Further, when asked if he had any objection to the grandparents taking Camille to Eden Isles overnight, Mr. Harris stated, "I would like to know about it." The Galjours' attorney pressed for clarity: "It's my understanding that your concerns are you want to be notified ahead of time if they are going to take the child to spend the night on the way from Pat and Gaston's house in Metairie; is that correct, Mr. Harris?"

"Yes, ma'am. I would like to know where my child is and what would be done with her outside my presence." (Record, p. 161, lines 20-31.)

> I would like to know what they are going to do with my child, Miss Perrone. If she's going fishing in the boat, I'd like to make sure she wears a life jacket. I'd like to know where my child is in case I need to get her for any type reason.

(Record, p. 162, lines 4-9.)

The Court clearly was concerned about Mr. Harris' desires. "I'm worried about the father of the child. I'm interested in his feelings, what he wants" (Record, p. 146, lines 23-30).

The trial court then heard from the grandmother. When asked how much time the grandparents would like with

Camille, Pat Galjour replied, "I would like to have a lot of time, every other weekend, every weekend. We'd like some time in summer, like to see her during Christmas holidays, also love to take family vacations every summer." (Record, p. 165, lines 15-18.) When asked about weekend visitation, the grandmother wanted the weekend to start on Friday after school and continue to allow the grandparents to bring Camille to school on Monday morning. (Record, p. 165, lines 21-22.)

Mrs. Galjour also testified that both she and her husband, Gaston, were retired and had all the time in the world and could pick up Camille and take responsibility for all transportation (Record, p. 165, lines 23-29).

After hearing from both Mr. Harris and the grandmother, Pat Galjour, the trial court honored every single restriction and limitation which Jeffery Harris had requested when she made her ruling which was then reduced to a judgment, found at petitioner's *Writ of Certiorari*, Appendix B, pages 20a-24a.

Having implemented by way of judgment all of Jeffrey Harris' conditions and restrictions upon the grandparents' visitation, the trial court complied with the implied mandates of *Troxel* in according "at least some special weight to the parents' own determination". *Troxel,* 120 S. Ct. at 2062. For these reasons, Petitioners' writ of certiorari should be denied. The statute is constitutional "as applied".

III.

THIS CASE DOES NOT PRESENT WITH FAR-REACHING IMPLICATIONS

There is a third and final reason why this Court should not grant the petitioner's writ of certiorari. The *Troxel* case dealt with the interpretation of a Washington statute which was breathtakingly over broad. Any person at any time could conceivably ask for visitation rights as long as the person could show that it was "in the best interest of the child." Understandably, the Washington Supreme Court struck down the statute as unconstitutional.

In upholding the Louisiana statute in question, the Louisiana First Circuit Court of Appeal examined it in light of *Troxel*. The Louisiana statute is unique, however, in that the rights of visitation it grants operate coextensively with the obligations which grandparents have to support their descendants under other provisions of Louisiana law.

This interplay of various unique state laws which grant rights and confer obligations upon ascendants, *i.e.*, the grandparents, cannot be compared to the isolated overly broad Washington statute. Indeed, the implications of the *Galjour v. Harris* case do not reach any farther than the fingers of the Louisiana bayous.

The philosophical underpinnings of grandparent rights are founded in the notion that ascendants (grandparents) in this state have a duty to support their descendants in need. La. C.C. Art. 229 reads as follows:

> Children are bound to maintain their father and mother and other ascendants, who are in need, and the relatives in the direct ascending line are likewise found to maintain their needy descendants, this obligation being reciprocal. This reciprocal obligation is limited to life's basic necessities of food, clothing, shelter and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources.

In *Troxel,* there was no such duty referenced as part of Washington state law. Accordingly, this Court must recognize that Louisiana has placed such importance on its heritage of strong family ties that it has bound ascendants and descendants to support one another, throughout each other's lifetimes.

This alone provides a compelling reason to allow grandparents visitation rights if they are concomitantly financially responsible by law. This distinguishing factor was obviously not addressed in the *Troxel* decision; however, the Court in *Reinhardt, supra*, held that the State and ascendants have a legitimate and substantial interest to maintain extended family relationships through reasonable visitation. Further, *Reinhardt*, specifically referenced La. C.C. Article 229, the state-mandated support obligation of ascendants for their descendants in need.

Thus, even if this Court were to contemplate revisiting certain aspects of *Troxel*, the unique position of ascendants under Louisiana law should preclude this Court from considering same. Petitioner's writ should be denied.

CONCLUSION

Justice Stevens in *Troxel* cited U.S. Supreme Court precedent as authority for the proposition that the child has a constitutional liberty interest. Therefore, use of a balancing test is appropriate because there are generally comparable but competing interests in maintaining extended relationships, especially involving families from broken homes or single-parent homes.

The child's liberty interest and rights of association, especially in light of one parent's death, can and should be balanced with the interest of the surviving custodial parent and the grandparents who have a substantial familial relationship with the child, based upon a case-by-case inquiry. The surviving parent's liberty interest and the right of privacy to raise a child without interference by third parties should never be deemed absolute.

Accordingly, the Louisiana First Circuit Court of Appeal properly weighed all of the competing considerations raised in *Troxel*. Its decision should not be disturbed.

Respectfully submitted,

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